RECORD AND BRIEF

No. 15-1391

FILED

IN THE

Supreme Court of the United States

EXPRESSIONS HAIR DESIGN, LINDA FIACCO, BROOKLYN FARMACY & SODA FOUNTAIN, INC., PETER FREEMAN, BUNDA STARR CORP., DONNA PABST, FIVE POINTS ACADEMY, STEVE MILLES, PATIO.COM AND DAVID ROSS,

Petitioners,

v.

ERIC T. SCHNEIDERMAN, IN HIS OFFICIAL CAPACITY AS ATTORNEY GENERAL OF THE STATE OF NEW YORK; CYRUS R. VANCE , JR., IN HIS OFFICIAL CAPACITY AS DISTRICT ATTORNEY OF NEW YORK COUNTY; KENNETH P. THOMPSON, IN HIS OFFICIAL CAPACITY AS DISTRICT ATTORNEY OF KINGS COUNTY,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR CONSUMER ACTION, NATIONAL ASSOCIATION OF CONSUMER ADVOCATES AND U.S. PUBLIC INTEREST RESEARCH GROUP AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICI CURIAE*

Amici curiae are three leading consumer advocacy groups whose decades of collective experience advocating for consumers make them qualified to assist the Court in understanding the substantial public interest at issue here. Amici have broad knowledge about the history of credit cards and are particularly well qualified to assist the Court in understanding how the public interest, and consumers' economic interests in particular, are undermined by no-surcharge laws, which were originally advanced by the credit card industry, and by similar bills that are being introduced and lobbied for by the industry in various other states on an ongoing basis.[1]

Consumer Action has been educating consumers on credit card related matters, including credit card surcharges, for more than four decades. Consumer Action has been a champion of underrepresented consumers since 1971. A national, nonprofit 501(c)(3) organization, Consumer Action focuses on financial education that empowers low to moderate income and limited-English-speaking consumers to financially prosper. It also advocates for consumers in the media and before lawmakers to advance consumer rights and promote industry-wide change particularly in the fields of credit, banking, housing, privacy, insurance and utilities.

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[1] Counsel for Amici provided counsel for the parties timely notice of intent to file this brief, and the parties have consented. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than amici curiae, their members, or their counsel made a monetary contribution to their preparation or submission.

National Association of Consumer Advocates (NACA) is a non-profit corporation whose members are private and public sector attorneys, legal services attorneys, law professors, and law students whose primary focus involves the protection and representation of consumers. NACA's mission is to promote justice for all consumers by maintaining a forum for information sharing among consumer advocates across the country and serving as a voice for its members as well as consumers in the ongoing effort to curb unfair and abusive business practices.

U.S. Public Interest Research Group (U.S. PIRG), the federation of state Public Interest Research Groups, is a national, nonprofit, non-partisan consumer advocacy organization that stands up to powerful special interests on behalf of the American public. U.S. PIRG has long advocated on the issue of swipe fee reform. U.S. PIRG believes that cash customers should not pay more to subsidize credit card reward programs and supports efforts to make the costs of credit transparent to consumers.

INTRODUCTION AND SUMMARY OF ARGUMENT

American merchants pay the highest fees on credit card transactions in the world, fees that are many times higher than the fees paid by merchants in most other developed countries. It is estimated that merchants incur upwards of $50 billion in swipe fees per year. Merchants have no choice but to pass on these credit card costs to consumers in the form of higher retail prices on the goods and services they purchase every day. The main reason that there is not more awareness and outcry about this issue is that swipe fees are hidden from consumers.

New York and nine other states prohibit merchants from communicating to consumers that they are charging a separate fee to account for the costs of credit card acceptance. By prohibiting merchants from informing consumers about the costs of credit card use, no-surcharge laws hinder consumers' ability to make meaningful and cost conscious decisions about payment choice. No-surcharge laws deprive merchants of a valuable tool that could otherwise be utilized to help remedy the grossly inefficient and anticompetitive payment system.

Amici here support the petition for certiorari in order to address the split in the Circuit Courts of Appeal that unless resolved will continue to detrimentally affect American consumers.

ARGUMENT

I. NO-SURCHARGE LAWS FORCE MERCHANTS TO RECOUP SUPRA-COMPETITIVE SWIPE FEES BY RAISING STICKER PRICES FOR ALL CONSUMERS.

To adequately understand the policy considerations relating to no-surcharge laws, one must first understand the merchant fees that comprise the underlying problem. Every time a consumer uses a credit card, the merchant pays 1–4%[2] of the transaction value in "swipe fees," most of which go to the issuing bank as "interchange fees."[3] Interchange fees in America are the highest in the world, generating approximately 50 billion dollars per year for credit card issuers, with more than 200 million dollars of it from federal agencies alone.[4] Interchange fee rates jumped

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[2] These fees are usually a hybrid of a per-transaction price and a percent of transaction cost, and sometimes can reach 15%, depending on the risk factor of the merchant. *See* Elizabeth Warren, *Antitrust Issues in Credit Card Merchant Restraint Rules*, Tobin Project Risk Policy Working Group, 1 (May 6, 2007) *available at* http://www.docstoc.com/docs/26252409/Antitrust-Issues-in-Credit-Card-Merchant-Restraint-Rules.

[3] These fees are technically divided between three banking entities, but for the purposes of this brief, the technical structure of credit card payment systems is irrelevant. *See* Adam J. Levitin, *Priceless? The Social Costs of No-Surcharge Rules*, Business, Economics and Regulatory Policy Working Paper Series No. 973974, 7 (Jan. 2008 Revision) *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1004396.

[4] *See, e.g.*, Keith Bradsher, *U.S. Looks to Australia on Credit Card Fees*, N.Y. TIMES (Nov. 24, 2009), http://www.nytimes.com/2009/11/25/your-money/credit-and-debit-cards/25card.

23% between 2000 and 2006, and because the volume of credit card transactions also increased dramatically, the absolute cost of interchange fees for merchants increased 139% during the same period.[5] "For many merchants, credit card acceptance has become the fastest growing cost of doing business."[6]

No-surcharge rules have helped to enable credit card use to increase despite being "more expensive on average for merchants than cash and checks,"[7] by limiting merchants' ability to pass these fees to the consumers who choose to use credit cards. By returning a small portion of the swipe fee revenues in the form of points to a fraction of consumers who participate in credit card rewards programs, credit card companies have constructed a system whereby consumers actively, and unknowingly, choose the most costly payment system. Increased swipe

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html?pagewanted=all; Andrew Martin, *Card Fees Pit Retailers Against Banks*, N.Y. TIMES (Jul. 15, 2009), http://www.nytimes.com/2009/07/16/business/16fees.html.

[5] Levitin, *supra* note 3, at 49.

[6] Adam J. Levitin, *Priceless? The Economic Costs of Credit Card Merchant Restraints*, 55 UCLA L. REV. 1321, 1345 (2008) (citing *Financial Services Issues: A Consumer's Perspective, Hearing Before the Subcomm. on Financial Institutions and Consumer Credit of the H. Comm. on Financial Institutions*, 108th Cong. 115 (2004) (statement of John J. Motley III, Sr. Vice President, Food Marketing Institute)).

[7] David S. Evans & Richard Schmalensee, INTERCHANGE FEES IN CREDIT AND DEBIT CARD INDUSTRIES, PROCEEDINGS OF THE 2005 FEDERAL RESERVE BANK OF KANSAS CITY CONFERENCE, *The Economics of Interchange Fees and Their Regulation: An Overview*, 96 (2005), *available at* http://ssrn.com/abstract=744705.

fees fuel greater rewards, which fuel greater use, in a race to the top—precisely the opposite of competitive pricing.

This potent combination of greater demand for credit card use and increasing swipe fees has forced merchants to increase retail sticker prices to all consumers to recoup their credit card costs. "[H]undreds of thousands of merchants . . . must take credit cards at any price because their customers insist on using those cards." *United States v. Visa U.S.A., Inc.*, 163 F. Supp. 2d 322, 341 (S.D.N.Y. 2001), *aff'd*, 344 F.3d 229 (2d Cir. 2003).[8] Simultaneously, no-surcharge laws impede merchants' ability to communicate and allocate the cost of credit card usage to the consumers who impose the cost by choosing to pay with credit cards.[9] To cover the costs of credit card merchant fees, merchants are forced to raise

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[8] *See also* General Court of the European Union, T-111/08, *MasterCard Inc. et al., v. Comm'n* (2012) 28 ("[T]he MasterCard payment organisation [sic] collectively exert market power vis-à-vis merchants and their customers.") *available at* http://curia.europa.eu/juris/liste.jsf?num=T-111/08&language=EN.

[9] While merchants are technically allowed to discount in favor of other payment forms, discounting is not always economically feasible for merchants because of an "installed-base" problem associated with many payment forms. For example, if a merchant today implemented a 2% discount off the retail price for debit card usage, this discount would apply to all debit transactions, and not just those debit transactions in which the consumer would have otherwise paid with a credit card. For the approximately 40% of consumers that would have already paid with a debit card regardless of the discount, the 2% discount represents a loss to the merchant. It would be very difficult to offset this substantial loss with actual usage shifts in favor of debit cards. Because of this, it might not make economic sense for merchants to discount in favor of mature payment products with significant market share.

the unified sticker prices for all their goods. Cash buyers pay higher retail prices than they otherwise should, while credit card customers are discounted from the true cost of their transaction. Credit card consumers receive all the benefits of credit card use, while cash customers receive no benefit and pay a premium to cover the difference—a pervasive cross-subsidy operating on all transactions. As Elizabeth Warren has put it: No-surcharge rules operate to force most merchants "to charge *all* consumers higher prices in order to cover the costs of accepting credit card transactions. As a result, non-credit consumers (food stamps, cash, checks, debit) end up subsidizing credit card consumers and, indirectly, subsidizing the entire credit card industry."[10] The estimated overall cross-subsidy between cash and credit users is staggering: "On average, each cash buyer pays $149 to card users and each card buyer receives $1,133 from cash users every year."[11]

The explosion in rewards card programs has exacerbated the problem of hidden cross-subsidies considerably. "Rewards cards have risen from less than 25 percent of new card offers in 2001 to nearly 60 percent in 2005" and now are considered to "drive the growth in . . . all credit card usage."[12] The power of rewards to increase credit card usage—though vitally, not to increase overall consumer spending—is closely tied with increases in swipe fees. In fact, rewards cards and corporate cards sometime

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[10] Warren, *supra* note 2, at 1.

[11] *See* Scott Schuh et al., FEDERAL RESERVE BANK OF BOSTON, *Who Gains and Who Loses from Credit Card Payments?:* 3 (2010) *available at* https://www.bostonfed.org/economic/ppdp/2010/ppdp1003.pdf.

[12] Levitin, *supra* note 6, at 1344–46.

cost merchants twice as much in fees.[13] In 2007, Visa's ultra-premium rewards card's interchange rate at large supermarkets—among the merchants with theoretically the most leverage to negotiate fees—was 2.20% plus 10¢ per transaction, roughly double the average interchange fee.[14] Likewise, MasterCard's premium rewards card's interchange is as much as 3.25% per transaction.[15]

Far from being a problem for credit card networks, the across-the-board price increases work in their favor: "Card networks have the incentive to charge high interchange fees to inflate retail prices so that they can create more demand for their service . . . . As the card payments become more efficient and convenient than alternatives, the card networks are able to further raise the interchange fees, inflate the value of transactions and hence extract more profits" without lifting consumer surplus and merchant profits.[16] Neither merchants nor non-credit card users gain any marginal benefit from these high-end rewards cards, but they both end up footing the bill for immense credit card company profits, and the generous rewards they provide to a tiny segment of consumers.

No-surcharge laws thus help to gag merchants and deny consumers vital information about the relative costs

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[13] Levitin, *supra* note 6, at 1323.

[14] Levitin, *supra* note 6, at 1348.

[15] Levitin, *supra* note 6, at 1333.

[16] Zhu Wang, Federal Reserve Bank of Kansas City, *Market Structure and Credit Card Pricing: What Drives the Interchange?*, 7 (2007), *available at* http://www.frbatlanta.org/news/CONFEREN/08payments/08payments_Wang.pdf.

of payment forms, ensuring that cards are never put into serious price competition with each other or with other payment forms. Price signals, as this case demonstrates, are essential to a free market economy. *See Bates v. State Bar of Ariz.*, 433 U.S. 350, 364 (1977). In a less competitive environment, companies have less incentive to price competitively and prices therefore increase. *Id.* at 377-78. Commercial speech restraints like the ones at issue thwart price competition. Thus, credit card companies will continue to engage in a race to the top by increasing swipe fees, without concern that consumer usage will be impacted.[17] No-surcharge laws aid in maintaining unified pricing at the point-of-sale, concealing from consumers that credit card users are free riding on cash consumers and simultaneously driving retail prices up. Meanwhile, merchants have no choice but to accept credit card networks' swipe fee increases.

II. THE CROSS SUBSIDIES CREATED BY NO-SURCHARGE LAWS ARE HIGHLY REGRESSIVE.

Credit card companies direct a small fraction of their supra-competitive profits to their richest customers at the cost of low-income consumers, effectively implementing a regressive tax on all consumers. Consumers using "cash"—which for purposes of this brief includes checks, debit cards, and food stamps—unknowingly pay a premium that subsidizes the credit card networks and their high income consumers. The distribution of benefits

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[17] Levitin, *supra* note 6, at 1341 (citing Merchant Discount Fees, NILSON REP., Aug. 2006, at 11; U.S. Interchange Fees, NILSON REP., May 2003, at 10).

is no accident: credit card companies almost exclusively target affluent consumers and corporate accounts for the most generous rewards.[18]

On average, cash consumers are far lower income, and embrace a larger proportion of minorities, than credit card users.[19] Ten percent of adult Americans are completely "unbanked" and therefore ineligible for credit cards.[20] Within the lowest income quintile of Americans, 29% are unbanked.[21] Credit cards are also disproportionately unavailable to minorities: "While less than 5% of the white, non-Hispanic population lacks a bank account, 20% of non-whites and Hispanics are unbanked."[22] Approximately 40% of the lowest income quintile of Americans have a credit card, while 67% households with income of $20-$50 thousand dollar per year, and 97% of households over earning over $120 thousand per year, have at least one credit card.[23] Naturally, the distribution of access to credit cards means that this cross-subsidy overwhelmingly benefits high income consumers: "credit card spending by high-income consumers is nearly five times higher than

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[18] Levitin, *supra* note 6, at 1346 n.76 (citing Burney Simpson, *Merchants Tackle Credit Card Fee Policies*, CARDS & PAYMENTS, 32 Jan. 2006).

[19] *Id.*; *see also* William C. Dunkelberg & Robert H. Smiley, *Subsidies in the Use of Revolving Credit*, 7.4 J. MONEY CREDIT & BANKING 477 (1975).

[20] Warren, *supra* note 2, at 1.

[21] Levitin, *supra* note 3, at 44.

[22] *Id.*

[23] Schuh, *supra* note 11, at 8.

credit card spending by low-income consumers, and . . . high-income consumers are 20 percentage points more likely to receive credit card rewards."[24] No-surcharge laws help facilitate this massive transfer of resources from cash users to credit card users, and even among credit card users, from low-income, low-rewards card users to high-income, high-rewards card users. Not having to bear the full costs of their usage, rewards card users use credit cards more often and more exclusively than those without rewards credit cards.[25] "By far, the bulk of the transfer gap is enjoyed by high-income credit card buyers [income $100k+], who receive a $2,188 subsidy every year," as opposed to the low income credit card buyers, who "receive a subsidy [of] $613."[26] In absolute terms, the estimated transfer is about $1.4 billion to $1.9 billion from non-rewards consumers to rewards consumers on gasoline and grocery purchases alone.[27] Together, the no-surcharge laws' support a lack of transparency and run-away rewards programs (also facilitated by no-surcharge laws), which are largely responsible for this enormous regressive and hidden wealth transfer. In effect, this allows credit card companies to tax the poor and give a small share of those proceeds to the rich.

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[24] Schuh, *supra* note 11, at 8.

[25] Andrew Ching & Fumiko Hayashi, FEDERAL RESERVE BANK OF KANSAS CITY, *Payment Card Rewards Programs and Consumer Payment Choice*, Working Paper No. 06-02, 4 (2006), *available at* http://www.kansascityfed.org/PUBLICAT/PSR/ RWP/ching_hayashi_paper.pdf.

[26] Schuh, *supra* note 11, at 21.

[27] *Id.* at 3 (citing Efraim Berkovich, *Card Rewards and Cross-Subsidization in the Gasoline and Grocery Markets*, REV. OF NETWORK ECON. 11.4 (2012)).

III. THE EXISTENCE OF NETWORK EFFECTS DOES NOT JUSTIFY NO-SURCHARGE LAWS.

In analyzing no-surcharge laws, economic theorists have vastly overemphasized the importance of "network effects"—the idea that credit cards increase in value based on the number of merchants and consumers who use them—in analyzing the laws' impact on consumer welfare.[28] These theories can only be employed as a defense of no-surcharge rules under the woefully myopic belief that positive network effects are the *only* consequence of increased credit card spending. In fact, if surcharging caused a decrease in credit card usage, it undoubtedly would increase overall consumer welfare because: first, some transactions will likely be diverted to other more inexpensive payment forms, like debit, which have their own network effects that will offset "harm" to credit card networks; second, credit card usage has specific externalities which undermine the facile assumption that more credit card debt means more consumer welfare.

A. Increased Use of Other Payment Forms, Like Debit Cards, Along With Reductions in Swipe Fees, Will More than Offset the Welfare Costs of Decreased Credit Card Usage.

Surcharging will create genuine competition between payment forms, benefiting debit card users and driving down swipe fees for everyone. Many other payment forms are subject to network effects, meaning that the diverted credit card usage would create comparable welfare gains in other networks. The marginal loss to credit card users would be offset by the benefits to debit users. In fact, for

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[28] *See* Levitin, *supra* at note 6, at 1385–90.

newer payment forms, adoption matters a great deal more. By the time networks are as well-established and mature as credit cards, "the adoption and usage externality has become less important."[29] The qualities that most consumers cite as their reasons for using credit cards – convenience, security from theft, widespread acceptance, speed at checkout – are fully replaceable by other payment forms like debit cards, at *half* the cost.[30]

States have no legitimate interest in artificially sparing credit cards from free and open competition with other payment forms. If no-surcharge laws are necessary to maintain credit cards' position vis-à-vis other payment forms, it is preserving a market failure that substantially harms consumers. The Supreme Court has rejected state attempts to restrict advertising based on the "fear that people would make bad decisions if given truthful information." *Thompson v. W. States Med. Ctr.*, 535 U.S. 357, 359 (2002); *Bates*, 433 U.S. at 364 (holding that commercial speech "performs an indispensable role in the allocation of resources in a free enterprise system"). In fact, the most likely and significant outcome of allowing merchants to surcharge is decreased swipe fees. There is evidence that "no surcharge rules increase the price of all other payment system to match the price of credit cards,"[31]

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[29] Wang, *supra* note 16, at 33.

[30] Evans & Schmalensee, *supra* note 7, at 96-97. Many debit cards actually offer superior security through the use of pin systems and because debit card fraud does not affect a consumer's credit report, whereas credit card fraud does. Levitin, *supra* note 5, at 1387.

[31] Levitin, *supra* note 6, at 1358 (citing Joseph Farrell, *Efficiency and Competition Between Payment Instruments*, 5 Rev. Network Econ. 26, 31 (2006)). Under current common contract

explaining why "interchange fees in the United States are more than double those in some other countries (Australia, EU cross-border, and the UK)."[32] Australia's relatively recent ban on no-surcharge rules immediately led to increased debit usage, while the average swipe fee fell by nearly half, across the board.[33] Significantly, it also led to increased volume on its network.[34] Moreover, even without no-surcharge rules, credit card companies continue to profit in Finland, the Netherlands, Portugal, Sweden, the United Kingdom, Switzerland, and Australia.[35] In fact, MasterCard voluntarily rescinded its own no-surcharge rule for Europe in 2005.[36]

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terms, no credit card issuer would benefit from lifting the restraints unilaterally because the other, presumably more costly, credit card companies would still be protected by their own no surcharge rules. *See* Levitin, *supra* note 5, at 1359.

[32] Stuart E. Weiner & Julian Wright, *Interchange Fees in Various Countries: Developments and Determinants*, 4.4 REV. OF NETWORK ECON. 299 (2005) *available at* https://www.academia.edu/3095968/Interchange_Fees_in_Various_Countries_Developments_and_Determinants.

[33] RESERVE BANK OF AUSTRALIA PAYMENT STATISTICS, BULLETIN TABLE C3, AVERAGE MERCHANT FEES FOR DEBIT, CREDIT AND CHARGE CARDS, http://www.rba.gov.au/statistics/tables/xls/c03hist.xls.

[34] Levitin, *supra* note 3, at 61.

[35] Levitin, *supra* note 6, at 1389. For an overview of global regulation of interchange fees, *see* Terri Bradford & Fumiko Hayashi, FEDERAL RESERVE BANK OF KANSAS CITY PAYMENTS SYSTEM RESEARCH BRIEFING, *Developments in Interchange Fees In the United States and Abroad*, (Apr. 2008),*available at* http://www.kansascityfed.org/publicat/psr/briefings/psr-briefingApr08.pdf.

[36] *Surcharging in Europe*, NILSON REP., Sept. 2004, at 6–7.

In light of these real world examples, it is impossible to say with a straight face that no-surcharge rules really help consumers. No-surcharge laws may be vital to the preservation of supra-competitive profit margins for credit card companies, but there is no economic theory that can twist this interest into a pro-consumer justification of the law.

B. Overconsumption of Credit Card Debt Causes Uniquely Harmful Social Externalities.

A supposedly pro-consumer defense of no-surcharge laws based on spurring expanded use of credit cards is radically out of step with the facts of credit card debt consumption. Credit card debt in America was $870 billion by May of 2012.[37] Moreover, "Americans racked up nearly $48 billion in new credit card debt in 2011, 424 percent more than what they charged in 2010, and 577 percent more than in 2009. Although total outstanding credit rose only about $4 billion, that number was largely offset by the magnitude of consumer defaults—*$44.2 billion worth.*"[38] As a result of a phenomenon unique to credit card debt, consumers consistently underestimate both the credit debt they already hold, and the costs they will eventually incur. In 2011, Americans held an average of $7,134 in credit card debt per household, but reported themselves as having an average of $2,000 less.[39] Credit card usage

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[37] The Associated Press, *Consumers Take on More Debt*, N.Y. Times, (Jul. 9, 2012), *available at* http://www.nytimes.com/2012/07/10/business/credit-card-debt-climbed-by-8-million-in-may.html?_r=0.

[38] Meg Handly, *Consumers Still Buried In Credit Card Debt*, U.S. News and World Report (Mar. 12, 2012)

[39] Meta Brown et al., Federal Reserve Bank of New York, *Do We Know What We Owe? A Comparison of Borrower- and Lender-*

is also causally linked to personal bankruptcy, and credit card companies target bankrupt and near-bankrupt households with predatory offers.[40] Following the ban on no-surcharge rules, Australia saw a 43% decrease in the gross of credit card debt.[41] A comparable reduction in the growth of American credit card debt, far from being a cost of surcharging, would be a highly desirable side effect.

IV. THE PETITION SHOULD BE GRANTED TO RESOLVE THE CIRCUIT SPLIT AND ALLOW MERCHANTS TO FREELY AND ACCURATELY CONVEY PRICING INFORMATION TO CONSUMERS.

The Second and Fifth Circuits have both held that the nearly identical no-surcharge laws of New York and Texas, respectively, regulate conduct and not speech and therefore do not implicate the First Amendment. *Expressions Hair Design v. Schneiderman*, 808 F.3d 118, 131 (2d Cir. 2015); *Rowell v. Pettijohn*, 816 F.3d 73, 82 (5th

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Reported Consumer Debt, (Oct. 2011), *available at* http://www.newyorkfed.org/research/staff_reports/sr523.pdf; *see also* Oren Bar-Gill, *Seduction by Plastic*, 98 Nw. U. L. Rev. 1373, 1396–402 (2004); Levitin, *supra* note 3, at 50–52 (describing various studies outlining consumer under appreciation of the cost of credit).

[40] *See* Teresa A. Sullivan, Elizabeth Warren, Jay Lawrence Westbrook *Credit Cards* at 108, THE FRAGILE MIDDLE CLASS: AMERICANS IN DEBT, Yale University Press (2000), (outlining the connection between credit card usage and bankruptcy); Levitin, *supra* note 3, at 43.

[41] *See* Adam J. Levitin, *The Antitrust Superbowl: America's Payment Systems, No-Surcharge Rules, and the Hidden Costs of Credit*, 3 BERK. BUS. L. J. 69, 137 (2006).

Cir. 2016). These rulings effectively prohibit merchants from communicating to consumers the true costs of credit card acceptance. And so, to recoup these costs, merchants are forced to bake them into their retail prices and cash-paying consumers end up overpaying – without their knowledge. The upshot is that swipe fees will remain hidden from consumers in New York and Texas, unless this Court intervenes.

The Eleventh Circuit, on the other hand, has recognized that Florida's no-surcharge law was not a regulation of pricing but "an unconstitutional abridgement of free speech." *Dana's R.R. Supply v. Attorney Gen., Fla.*, 807 F.3d 1235, 1251 (11th Cir. 2015). The import of this ruling is that merchants in Florida are now allowed to accurately inform consumers about the costs of credit card transactions by communicating that there is a separate charge for credit card usage.

There is a clear split in the Circuit Courts of Appeal that needs to be addressed. As it currently stands, consumers in several states remain blind to the true cost of credit card transactions and merchants are prohibited from providing that information to them. It is critically important for all American merchants to be able to accurately convey the costs of credit transactions so that consumers can make informed decisions about their payment choices.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

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Respectfully submitted,

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